**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KOOME & MAKHANDIA JJA.)**

**CIVIL APPLICATION NO. 352 OF 2019**

**BETWEEN**

**EXPORT PROCESSING ZONES AUTHORITY KENYA……...…..1ST APPLICANT**

**CABINENT SECRETARY, MINISTRY OF**

**INTERIOR ……...…….…….....……...2ND APPLICANT**

**AND**

**FANUEL ODEDE KIDENDE…….…….....……..…..1ST RESPONDENT**

**CABINENT SECRETARY, MINISTRY**

**OF INDUSTRY, TRADE & CO-OPERATIVES**

**HON. PETER MUNYA, MGH…….....….2ND RESPONDENT**

**ATTORNEY GENERAL…….....……..…3RD RESPONDENT**

***(Being an application under Rule 5 (2) of the Court of Appeal Rules seeking stay of proceedings in the Employment and Labour Relations Court (ELRC) at Nairobi pending the hearing and determination of an intended appeal against the decision of ELRC (Wasilwa, J.) dated 24th October, 2019***

**in**

**PE T. NO. 110 OF 2018)**

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**RULING OF THE COURT**

1. The Notice of Motion dated 11th November, 2019 seeks principally an order staying further proceedings in Nairobi, Employment and Labour Relations Court (ELRC) Petition in No 110 of 2018. The central issue raised in the motion as in almost all applications brought under ***Rule 5 (2) (b)*** of this Court's Rules is whether the intended appeal from the order made by Wasilwa, J. on 24th October, 2019 raises an arguable point and whether the intended appeal will be rendered nugatory unless the said proceedings are stayed. Aware that this is an interlocutory application, our jurisdiction is highly circumscribed in that we cannot delve deep into issues in controversy which are yet to be determined both in the Petition before the trial court and the intended appeal.

2. That said, the motion is supported by the grounds enumerated on the face which are explained in greater details by the supporting affidavit sworn by ***Paul Gicheru*** on 11th November, 2019. Briefly stated, ***Fanuel Odede Kidenda***, (1st respondent) filed a Petition before the ELRC on 9th October, 2018 seeking; a declaratory order that a purported summary dismissal from his employment was *inter alia* unjustified, illegal and against the ***Articles 41*** and ***47*** of the Constitution; a permanent injunction compelling the respondents, agents, officers and whosoever to immediately rescind the appointment of ***Mr. George Makateto*** as acting managing director and reinstate the 2nd respondent as the Chief Executive Officer (CEO) of the ***Export Processing Zones Authority*** (applicant ) and an order restraining the respondents from declaring the position of the CEO of the applicant even in acting capacity until the petition was heard and determined. The 1st respondent also prayed in

the alternative that he be awarded a sum of Ksh. 33,732,000 as special damages, Ksh. 11,244,000 as general and punitive damages, terminal dues amounting to Ksh. 55,729,600 and costs of the petition.

3. Simultaneously with the filing of the petition, the 1st respondent filed a notice of motion seeking some interim reliefs to wit, an injunction compelling the applicant to rescind the appointment of ***George Makateto*** as the acting managing director and to reinstate the 1st respondent as the CEO with all his privileges, salaries and allowances and access to his office without victimisation. The motion was opposed and when it came up for hearing on the 11th December, 2018 the learned trial Judge did not grant a hearing to the applicant's counsel but proceeded to make the following order that: -

> ***"The petitioner be paid salary for work done up to December, 2018, the rest of the petition he subjected to reconciliation."***

4. The applicant filed an application to set aside the said orders of 11th December, 2018 which was fixed for hearing on 6th February, 2019 but come that day, the 1st respondent had also filed another application dated 1st February, 2019 seeking committal of the applicant on allegations of contempt of the orders of 11th December, 2019 by the applicants which motion was heard and dismissed on 30th April, 2019. On 11th September, 2019, the applicant's counsel was served with a mention notice that did not indicate the purpose thereto but when parties appeared before the learned trial Judge, she directed that the court was going to hear the substantive petition only and parties were directed to file their respective written submissions. The applicant filed another motion on 7th October, 2019 seeking to vary the order that the petition be heard by way of written submissions, instead it prayed that the same be heard by oral hearing and parties be at liberty to call witnesses. This was in view of the hotly contested material facts and allegations of fraud averred in numerous affidavits filed by the parties.

5. The applicant contends that its application seeking oral hearing was not heard and when the matter was further mentioned on 24th October, 2019 and counsel for the applicant sought directions on whether the Judge could vary the order requiring the matter be heard by way of written submissions this is what the Judge stated which is the subject matter of the intended appeal:-

> ***"The directions being sought have already been granted on 14th October, 2019, I will therefore not reopen the issue or sit on judgment in the same. The respondent to file submissions with 7 days. Mention on 30th October 2019."***

Out of caution and under protest the applicant's counsel filed submissions and judgment was reserved for 25th January, 2018. The applicant's counsel filed a Notice of Appeal on 31st October, 2019 and the instant motion seeking the aforesaid orders. The gravamen therein is that if judgment is rendered based on written submissions, the applicant will be prejudiced as it will be denied an opportunity to cross- examine witnesses on contested matters that touch on fraud. That a fair hearing is a constitutional imperative and no party should be denied an opportunity to call witnesses and cross – examine the opposite side.

6. The motion was opposed by the 1st respondent based on the grounds of opposition filed on 29th January, 2019 and a list of authorities filed on 30th June, 2020. It is contended that the applicant is merely forum shopping and using a delaying tactic so as to circumvent the disposal of the matter; that the applicant had wantonly disregarded court orders and as if that was not enough had engaged in filing endless applications all in a bid to delay the determination of the matter; that there is no arguable appeal as the parties do not know how the Judge will rule, in other words the applicant's application is predicated on the premise that the Judge was going to decide the matter in favour of the 1st respondent which is a mere apprehension and that the 1st respondent has suffered far greater damage due to the delay brought about by the applicant's manoeuvres to derail the effectual conclusion of the matter after which it can appeal if dissatisfied.

7. During the plenary hearing, the applicant was represented by ***Mr. Wekesa*** learned counsel for the applicant, he relied on his written submissions which he highlighted. He made reference to the replying affidavit sworn by ***Peter Munya*** the then Cabinet Secretary Ministry of Industry, Trade and Co-operative where he stated that the 1st respondent's appointment was fraudulently obtained without following due process and procedure and he gave reasons. He went on to state that as the appointing authority, he was at the alleged time the letter re-appointing the 1st respondent was issued not in the country. Due to these allegations of forgeries and utterances of official documents, the applicant wished the matter be heard by way of oral evidence which would grant every party an opportunity to ventilate their case. This right is guaranteed under ***Article 25 (c)*** and ***50*** of the Constitution. On the nugatory aspect if the orders sought are not granted, counsel cited among others the case of **Sammu Mutua Makove (Commissioner of Insurance) vs. Statutory Manager United Insurance Co. Ltd & 198 Others [2010] eKLR** where this Court acknowledged its jurisdiction to stay proceedings in the lower courts pending the hearing and determination of the appeal to avert a prejudicial trial that is likely to be reversed on appeal.

8. The 2nd and 3rd respondents were represented by ***Ms. Kinyua*** who supported the application by adopting the submissions made by ***Mr. Wekesa***. She urged us to allow the application so that the applicant is granted a hearing in line with principles of natural justice.

9. The motion was opposed by ***Mr. Anami*** learned counsel for the 1st respondent. He submitted that the 1st respondent is suffering because he suffered an injustice and approached the court for a remedy. He faulted the applicant for applying delaying tactics so as to stop the proceedings while claiming a denial of a right to a fair hearing notwithstanding the fact that they filed written submissions and the judgment has not been pronounced. A right to a fair hearing should be understood in the context of ***Article 157*** of the Constitution whereby the applicant has filed affidavits, annexed documents and filed written submission. Moreover, the Judge exercised her discretion and gave directions that the Petition should be disposed of by way of submissions. This according to counsel, the directions given to dispose the matter by way of written submissions without oral hearing is in line with the provisions of ***Rule 20*** of the **Mutunga Constitutional Practice Rules** that provides that a petition can be heard by way of submissions or by oral hearing. Moreover, the applicant actively participated in all the court proceedings.

10. Counsel made reference to the case of **Parliamentary Service Commission vs. Martin Nyaga Wambora & others [2018] eKLR** in which the Supreme Court laid down the following guiding principles in application(s) for review of a decision of the court made in exercise

of discretion as follows: -

> ***"(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.***
>
> ***(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;***
>
> ***(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.***
>
> ***(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.***
>
> ***(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.***
>
> ***(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:***
>
> > ***(a) as a result a wrong decision was arrived at; or***
> >
> > ***(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."***

Counsel concluded by stating that there was no abuse of discretion by the Judge in directing the matter be heard by way of written submissions, therefore the applicant had not demonstrated that there was an arguable appeal. On the nugatory aspect, counsel was of the view that even if judgment is rendered, the applicant will have an opportunity to appeal against the same.

11. We have considered the application, the grounds of opposition, the submissions and the list of authorities. The principles applicable to ***Rule 5 (2) (b)*** applications are well settled. Before the court can exercise its discretion in favour of the applicant, the applicant should demonstrate that the appeal is arguable and that unless the winding up proceedings are stayed the appeal, if it ultimately succeeds, would be rendered nugatory. Also in a recent ruling by the Supreme Court while dealing with an application seeking stay of execution and/enforcement or implementation of orders made by this Court in the case of **Ethics and Anti-Corruption Commission vs. Prof Tom Ojienda & Associates & 2 Others CA No 21 of 2019**; the Court re-stated the principles that guide the Court include the two stated above as well as a further consideration of whether a matter is in the public interest that that an order of stay be granted. This is what their Lordships stated in their own words at Paragraph 14 of the said Ruling

> **"In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, this Court enunciated three principles for consideration in determining applications for stay of execution. They are: "*whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted*."**

12. That said, the first issue is whether the applicant has established that there is an arguable appeal which will be rendered nugatory if the proceedings before ELRC are not stayed. It is apparent from the decision of this Court in **Silverstein vs. Chesoni [2002] 1 KLR 867** that as a general principle, the Court is reluctant to stay proceedings in the lower court as a matter of course but the Court will do so, if it is demonstrated that the appeal would indeed be rendered nugatory, if stay is not granted. The court in that case while allowing an application for stay of proceedings stated: -

> **"The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the courts own rules ….. each case must depend on its own facts ……."**

13. We are nonetheless aware that the intended appeal has not been filed as counsel for the applicant indicated from the Bar that the proceedings have not been availed as the court file is still in the custody of the trial Judge pending judgment. The question of whether the applicant has established an arguable point can be discerned from the matters deposed in the replying affidavits by ***Paul Gicharu*** and ***Peter Munya*** who make allegations of forgeries and fraud; whether those issues can be determined by affidavits and written submission or by oral hearing is an arguable point deserving to be determined in the intended appeal. We nonetheless need to throw caution that an arguable point is not one that must necessarily succeed but one which merits to be argued fully before an Appeals Court.

14. On the question whether the appeal would be rendered nugatory, if stay of proceedings is not granted, we note the applicant is claiming rights to a fair hearing and insisting that the rules of natural justice which are guaranteed under ***Articles 25 (c), 27*** and ***50*** of the Constitution will not be violated if the judgment will be delivered without a viva voce hearing of the parties. The evidence is required to test and to substantiate contested material facts on the allegations of fraud which the applicant contends unless subjected to a court room process might give rise to a miscarriage of justice. It might also be an inconvenience to file an appeal after judgment when the whole situation can be forestalled. The other compelling reason, which is not only constitutional but in the public interest, is the fact that a *viva voce* hearing cannot be prejudicial to parties as they all get an equal chance to call their witnesses and ventilate all the issues. If a party is denied this opportunity, they might suffer an injustice.

15. In the result, we are satisfied that this application has merit and it is an appropriate one for granting a stay of proceedings. Accordingly,

we hereby grant an order staying the proceedings in **Petition No. 110 of 2018** pending the hearing and determination of the intended appeal which should be filed and served within ninety (90) days from the date of this Ruling. Costs of this application shall be costs in the aforesaid appeal.

***Dated and delivered at Nairobi this 22nd day of May, 2020.***

**W. OUKO, (P)**

**……..……**

**JUDGE OF APPEAL**

**M. K. KOOME**

**…….……..**

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**..……..**

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

***DEPUTY REGISTRAR***